Public Service Company of Oklahoma (PSO) *and* International Brotherhood of Electrical Workers, Local Union 1002, AFL–CIO. Cases 17–CA–18967, 17–CA–18989, and 17–CA–19418

July 12, 2001

DECISION AND ORDER

BY MEMBERS LIEBMAN, TRUESDALE, AND WALSH

On October 30, 1998, Administrative Law Judge Clifford H. Anderson issued the attached decision. The Respondent, the General Counsel, and the Union each separately filed exceptions along with a supporting brief. The General Counsel additionally filed a brief in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[1] and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions as further discussed below and to adopt the recommended Order as modified and set forth in full below.[3]

Introduction

As the judge discusses in his thoughtful opinion, this case grows out of the rapid evolution of the electrical power industry. In that industry, as in others, deregulation and accelerating competition are placing enormous pressures on established labor-management relationships. For the institution of collective bargaining to succeed under these conditions, the process must be flexible. It is not unreasonable for employers, faced with changing economic circumstances, to respond by seeking changes in the organization of the workplace or the design of work. Here, however, the Respondent went far beyond what the law allows—and beyond what it should allow—if meaningful collective bargaining is to be preserved. Both at the bargaining table and away from it, the Respondent sought to eliminate the Union's role as representative. This was bad-faith bargaining. We write to emphasize the key factors that compel that finding.

We therefore agree with the judge, for the reasons set forth by him and those set forth below, that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to bargain in good faith with the Union for a successor collective-bargaining agreement. The judge found that the Respondent unlawfully insisted on proposals that granted it unilateral control over virtually all significant terms and conditions of employment during the life of the contract, thereby leaving the Union and the employees with far fewer rights than they would possess *without* any contract. We have carefully reviewed the record evidence and find that it fully supports the judge's finding.

Analytic Framework

Section 8(d) of the Act defines the duty to bargain collectively as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession." Good-faith bargaining "presupposes a desire to reach ultimate agreement, to enter into a collective bargaining contract." *NLRB v. Insurance Agents' Union*, 361 U.S. 477, 485 (1960).

In determining whether a party has violated its statutory duty to bargain in good faith, the Board examines the totality of the party's conduct, both at and away from the bargaining table. See, e.g., *Overnite Transportation Co.*, 296 NLRB 669, 671 (1989), enfd. 938 F.2d 815 (7th Cir. 1991); *Atlanta Hilton & Tower,* 271 NLRB 1600, 1603 (1984). From the context of an employer's total conduct, it must be decided whether the employer is engaging in hard but lawful bargaining to achieve a contract that it considers desirable or is unlawfully endeavoring to frustrate the possibility of arriving at any agreement. Id. Although the Board does not evaluate whether particular proposals are acceptable or unacceptable, the Board will examine proposals when appropriate and consider whether, on the basis of objective factors, bargaining demands constitute evidence of bad-faith bargaining. *Reichhold Chemicals*, 288 NLRB 69 (1988), affd. in relevant part 906 F.2d 719 (D.C. Cir. 1990), cert. denied 498 U.S. 1053 (1991). An inference of bad-faith bargaining is appropriate when the employer's proposals, taken as a whole, would leave the union and the employees it represents with substantially fewer rights and less

[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] On July 27, 2000, the General Counsel filed a motion for permission to withdraw from the consolidated complaint his allegation that the Respondent unlawfully discontinued the deduction of unit employees' union dues, pursuant to a dues-checkoff provision in the parties' collective-bargaining agreement, upon the expiration of that contract. The Union filed a motion in opposition, and the Respondent filed a joinder in the motion for permission to withdraw the allegation. In his motion, the General Counsel cites *Hacienda Resort Hotel*, 331 NLRB 665 (2000), in which a Board majority reaffirmed well-established precedent that an employer's obligation to continue a dues-checkoff arrangement expires with the contract that created the obligation. We grant the General Counsel's motion.

[3] We have modified the judge's recommended Order to reflect the appropriate injunctive language and to conform to the violations found. We have attached a new notice that reflects these changes.

protection than provided by law without a contract.[4] In such circumstances, the union is excluded from the participation in the collective-bargaining process to which it is statutorily entitled, effectively stripping it of any meaningful method of representing its members in decisions affecting important conditions of employment and exposing the employer's bad faith. See *A-1 King Size Sandwiches,* supra, 265 NLRB at 859 fn. 4.

Finally, it is axiomatic that under the NLRA neither the Board nor the courts may compel concessions or otherwise sit in judgment upon the substantive terms of collective-bargaining agreements. *NLRB v. American National Insurance Co.*, 343 U.S. 395, 403–404 (1952). However, "[e]nforcement of the obligation to bargain collectively is crucial to the [NLRA] statutory scheme." Id., at 402. Our examination of the Respondent's proposals in this proceeding is thus not to determine their merits, but instead to determine whether in combination and by the manner proposed they evidence an intent not to reach agreement. *Coastal Electric Cooperative*, 311 NLRB 1126, 1127 (1993).

Discussion

From the outset of the negotiations, the Respondent made clear to the employees and the Union that it was determined to secure a contract that would allow it to make unilateral changes in terms and conditions of employment during the life of the agreement. There is no dispute that the Respondent throughout negotiations adhered to this position. The Respondent's efforts in this regard culminated in its final bargaining proposal, which, as explained below, would have given the Respondent extraordinarily broad control over employee benefits and discipline and discharge, as well as including an exhaustive management-rights clause.

The final proposal denied the Union any role in establishing or maintaining employee benefit levels during the life of the contract. Rather, the Respondent committed itself only to treating unit employees as it treated other, nonrepresented employees. The final proposal permitted the Respondent to "chang[e] from time to time for business reasons" important employee benefits such as vacation days, holidays, medical insurance, leave time, and life, disability, and on-the-job accident insurance. "Business reasons" was defined in the Respondent's final proposal as including but not "limited to costs, efficiency, technology, skills, experience, or to beat competition and gain new or hold existing customers." The judge correctly observed that the broad "business reasons" requirement, vested in the Respondent's sole discretion, in no way diminished the Respondent's unilateral control of employee benefits.

Similarly, the Respondent's final proposal regarding discipline and discharge sought to retain essentially unfettered control over these topics. It provided that:

> Employees may be disciplined and/or discharged by the Employer for just cause which shall be defined as proof that the employee knowingly did the act for which he was disciplined, or otherwise renders the employee unfit for duty.

This expansive definition of "just cause" provides virtually no limitation on disciplinary action imposed by the Respondent. Further, the Respondent's proposal effectively foreclosed meaningful arbitral review by providing that the "arbitrator may adjust the penalty *only* if the Union is able to prove that the Employer's decision was arbitrary and capricious, *and* not taken for the reasons and the facts stated." (Emphasis added.)

Lastly, the Respondent's final proposal included an exhaustively broad management-rights clause.[5] The clause granted the Respondent the exclusive right to, inter alia:

- Schedule employees, their work times, locations and assignments;
- Change job assignments, and create new or "blended" positions which represent a mix of old unit positions or completely new unit jobs and work;
- Set and change performance criteria and standards to be used as measurement for the performance evaluation of employees, and based on such employment evaluation, assign, promote, demote, transfer, or lay off employees pursuant to business reasons;
- Assign supervisors or other nonclassified employees to perform any bargaining unit work as the Respondent determines necessary (but this right shall not be used to permanently supplant regular classified employees);
- Develop, post, use, modify, and enforce a set of company rules, such as but not limited to working and safety rules;

[4] *A-1 King Size Sandwiches,* 265 NLRB 850, 859–861 (1982), enfd. 732 F.2d 872, 877 (11th Cir. 1984), cert. denied 469 U.S. 1035 (1984); *NLRB v. Johnson Mfg. Co. of Lubbock,* 458 F.2d 453, 455 (5th Cir. 1972); *Eastern Maine Medical Center*, 658 F.2d 1, 12 (1st Cir. 1981), enfg. 253 NLRB 224, 246 (1980); *South Carolina Baptist Ministries*, 310 NLRB 156, 157 (1993). See *Logemann Bros. Co.*, 298 NLRB 1018, 1021 (1990).

[5] The clause is quoted in full in the judge's decision.

- Transfer, contract, or subcontract work, in whole or in part, to another employer or employers without restriction for business reasons;
- Consolidate or move working crews between the Respondent and others, establish, create, or consolidate any work, work crews, or jobs permanently or on a temporary basis, and create new positions or eliminate existing positions;
- For business reasons, create work, abolish work, leave it the same, consolidate, transfer, idle, or downsize;
- Select the equipment and processes to be used by employees including the introduction of new technologies which may or may not change the method of work or otherwise require permanent changes to the workplace and retraining or cross-training; and
- For business reasons, provide employees premium pay or a bonus above the wage rates specified in the agreement and to determine whether these shall be given, retained, modified or eliminated.

The Respondent's final proposals, as summarized above, establish that it insisted on unilateral control to change virtually all significant terms and conditions of employment of unit employees during the life of the contract. It sought discretion over hours, a major component of wage rates, and benefits, clearly the most basic terms for bargaining, as well as discharge, discipline, layoffs, subcontracting, assignment of unit work to supervisors, work and safety rules, transfers, demotions, employee qualifications, and elimination of unit work—all mandatory subjects of bargaining. The Respondent's insistence that the Union relinquish the employees' statutory right to bargain over these actions was coupled with a no-strike provision relinquishing the Union's right to protest such employer changes; and the no-strike agreement itself was coupled with a virtually meaningless arbitration provision. These proposals taken as a whole required the Union to cede substantially all of its representational function, and would have so damaged the Union's ability to function as the employees' bargaining representative that the Respondent could not seriously have expected meaningful collective bargaining. *A-1 King Size Sandwiches,* supra, 265 NLRB at 860; *Wright Motors*, 237 NLRB 570, 575–576 (1978), enfd. in relevant part 603 F.2d 604 (7th Cir. 1979).

Nor is the Respondent's insistence on retaining unilateral control of bargainable subjects diminished by the Respondent's "impact bargaining" proposal. The Respondent's final proposal would have subjected a few of the above terms of employment to impact bargaining, defined as "only an attempt between the Union and the Employer to reach accord, and shall not include 'decision bargaining.'" The impact bargaining procedure permitted the Respondent to implement unilateral action, including wage rates and job assignments for newly created positions. These newly implemented terms were merely subject *thereafter* to a 45-day period to reach accord, and "[s]hould no agreement be reached, the Employer may implement its last offer which shall then become part of the [contract] until the next negotiations which the matter can be reopened." The judge correctly found that the Respondent's impact bargaining proposal afforded the Union no right to traditional bargaining in a statutory sense, but rather limited it to a narrowly defined post-event consultation procedure at the conclusion of which the Respondent's previously implemented changes became permanent for the life of the contract. As the judge found, the impact bargaining proposal "did not in fact realistically limit the Respondent's power to act unilaterally and gave the Union no real power akin to the rights it had under the Act."

Indeed, the conclusion is inescapable that the Respondent's proposals, if accepted, would have left the Union and the employees with substantially fewer rights and protection than they would have had without any contract at all. Without a contract, the Union would have retained the statutory right to prior notice and bargaining over changes or modifications in terms and conditions of employment, and it would have retained the right to strike in protest of such actions. The Respondent, however, insisted that the Union relinquish its statutory right to bargain before the Respondent could effectuate changes in working conditions, as well as relinquishing the right to strike. The Union, therefore, could do just as well with no contract at all. *Radisson Plaza Minneapolis,* supra, 307 NLRB 94, 95 (1992), affd. 987 F.2d 1376 (8th Cir. 1993); *A-1 King Size Sandwiches*, supra, 732 F.2d at 877. In sum, the Respondent's proposal in this case approached what one court has described as the "paradigm management functions clause 'evading' the employer's collective bargaining duty[,]" in which a collective-bargaining agreement "would have just three clauses: (1) union recognition, (2) the employer's discretion over all terms, and (3) a no-strike clause." *McClatchy Newspapers, Inc. v. NLRB*, 131 F.3d 1026, 1034 (D.C. Cir. 1997), cert. denied 524 U.S. 937 (1998). Such a proposal demonstrates bad faith.

The Respondent's conduct away from the bargaining table confirms that it was focused more intently on eliminating its bargaining obligation to the Union than on successfully negotiating a collective-bargaining agreement. Approximately halfway through the parties' course of bargaining, the Respondent sent an electronic mail communication to all unit employees, soliciting them to notify the Respondent that they no longer wished to be represented by the Union. The aim was to enable the Respondent to obtain a decertification election to remove the Union as collective-bargaining representative. The judge found that this conduct violated Section 8(a)(1) of the Act, and the Respondent has not excepted to the judge's finding. The Respondent's unlawful solicitation supports the judge's finding of bad-faith bargaining, by establishing a desire to eliminate the Union's role as collective-bargaining representative of unit employees.

CONCLUSION

The judge's finding that the Respondent sought to retain unilateral control over virtually every significant aspect of the employment relationship is fully supported by the record evidence. We accordingly find that the Respondent failed to bargain in good faith in violation of Section 8(a)(5) and (1) of the Act by insisting as a price for any collective-bargaining agreement that its employees give up their statutory rights to be properly represented by the Union. *NLRB v. Johnson Mfg. Co. of Lubbock,* supra, 458 F.2d at 455.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Public Service Company of Oklahoma, Tulsa, Oklahoma, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Sending electronic mail communications to its unit employees soliciting them to notify the Respondent that they no longer wish to be represented by the Union.

(b) Refusing to bargain collectively and in good faith with the International Brotherhood of Electrical Workers, Local Union 1002, AFL–CIO (the Union) concerning rates of pay, hours of employment, and other terms and conditions of employment.

(c) Bargaining in bad faith with the Union by implementing portions of its final contract offer to the Union without the agreement of the Union and at a time when the parties were not at a valid impasse in bargaining.

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Upon request, bargain collectively and in good faith concerning rates of pay, hours of employment, and other terms and conditions of employment with the above-named Union as the exclusive bargaining representative of its employees in the following appropriate unit, and embody in a signed agreement any understanding reached.

> All outside construction and maintenance employees who work on the Respondent's property and power generation employees in operations and in construction and maintenance, excluding clerical employees, supervisory employees and guards.

(b) At the Union's request, restore the unit employees' terms and conditions of employment as they existed before the Respondent's improper unilateral changes on and after December 1996 and maintain those conditions, unless and until the Respondent either reaches agreement with the Union respecting proposed changes or properly implements its proposal following a valid impasse in bargaining.

(c) Make unit employees whole, with interest, for any and all losses they incurred by virtue of the Respondent's unlawful unilateral changes in employees' terms and conditions of employment on and after December 1996.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Tulsa, Oklahoma facility and other facilities at which unit employees are regularly employed, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director, in English and such other languages as the Regional Director determines are necessary to fully communicate with employees, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall du-

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

plicate and mail, at its own expense, a copy of the notice to all current and former employees employed by the Respondent at any time during or after the 1996 bargaining had commenced. The Respondent shall also disseminate, on the first day of notice posting as required herein, a copy of this notice in electronic fashion on the same basis and to the same group or class of employees as were sent the PROF in October 1996 found to violate Section 8(a)(1) of the Act.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice, and E-mail a PROF copy of this notice to employees.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT send electronic mail communications to our unit employees soliciting them to notify us that they no longer wish to be represented by the Union.

WE WILL NOT refuse to bargain collectively and in good faith with the International Brotherhood of Electrical Workers, Local Union 1002, AFL–CIO (the Union) concerning rates of pay, hours of employment, and other terms and conditions of employment.

WE WILL NOT bargain in bad faith with the Union by implementing portions of our final contract offer to the Union without the agreement of the Union and at a time when the parties were not at a valid impasse in bargaining.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain collectively and in good faith concerning rates of pay, hours of employment, and other terms and conditions of employment with the above-named Union as the exclusive bargaining representative of our employees in the following appropriate unit, and embody in a signed agreement any understanding reached.

> All outside construction and maintenance employees who work on our property and power generation employees in operations and in construction and maintenance, excluding clerical employees, supervisory employees and guards.

WE WILL, at the Union's request, restore our unit employees' terms and conditions of employment as they existed before our improper unilateral changes on and after December 1996 and WE WILL maintain those conditions, unless and until we either reach agreement with the Union respecting proposed changes or we properly implement our proposal following a valid impasse in bargaining.

WE WILL make unit employees whole, with interest, for any and all losses they incurred by virtue of our improper changes in employees' terms and conditions of employment on and after December 1996.

PUBLIC SERVICE COMPANY OF OKLAHOMA

Francis A. Molenda, Esq., for the General Counsel.
Lynn Paul Mattson and *Michael C. Redmon, Esqs. (Doerner, Saunders, Daniel & Anderson),* of Tulsa, Oklahoma, for the Respondent.
Duane R. Nordick and *Jon B. Gardner,* International Representatives, of the International Brotherhood of Electrical Workers, AFL–CIO, of Fort Worth, Texas, and Wichita, Kansas, for the Charging Party.

DECISION

STATEMENT OF THE CASE

CLIFFORD H. ANDERSON, Administrative Law Judge. I heard the above-captioned consolidated case in Tulsa, Oklahoma, in 9 days of trial during March 1998. Posthearing briefs were due on July 17, 1998. The matter arose as follows. On January 23, 1997, the International Brotherhood of Electrical Workers, Local Union 1002, AFL–CIO (the Union) filed a charge docketed as Case 17–CA–18967 against Public Service Company of Oklahoma (the Respondent). The Union filed a second charge against the Respondent docketed as Case 17–CA–18967 on January 23, 1997, and a third charge against the Respondent docketed as Case 17–CA–19418 amended on December 19, 1997. The Regional Director for Region 17 of the National Labor Relations Board issued an original order consolidating cases, consolidated complaint, and notice of hearing on September 26, 1997, addressing the first two cases and an order further consolidating cases, second consolidated complaint, and notice of hearing on December 31, 1997, consolidating all three cases.

In essence, the consolidated complaint alleges the Respondent violated Section 8(a)(1) of the National Labor Relations

Act (the Act) by interfering with, restraining, and coercing its employees in the exercise of their Section 7 rights by issuing an e-mail communication to its employees. The complaint further alleges that the Respondent violated Section 8(a)(5) and (1) of the Act by ceasing to deduct dues payments from employees' pay, pursuant to a dues-checkoff provision in the expired collective-bargaining agreement between the parties. Finally, the complaint alleges that the Respondent violated Section 8(a)(5) and (1) of the Act by engaging in bad-faith bargaining with the Union and improperly implementing changes in represented employees terms and conditions of employment.

FINDINGS OF FACT

All parties were given full opportunity to participate at the hearing, to introduce relevant evidence, to call, examine and cross-examine witnesses, to argue orally, and to file posthearing briefs.

On the entire record, including helpful briefs from the General Counsel, the Union, and the Respondent and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT[1]

I. JURISDICTION

The Respondent has, at all times material, been a public utility with an office and place of business in Tulsa, Oklahoma, and other locations throughout the State of Oklahoma, where it is engaged in the business of providing electricity to customers. The Respondent, during the course of these operations, annually purchases and receives goods and services valued in excess of $50,000 directly from sources outside the State of Oklahoma.

The complaint alleges and the answer admits, and based on the above commerce facts I find, the Respondent has at all times material been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Nature of the Unfair Labor Practice Allegations of the Complaint

The counsel for General Counsel's allegations revolve around the parties collective bargaining in the latter part of 1996 for a new contract to replace the former contract which was expiring by its terms at midnight on September 30, 1996, and the Respondent's actions during that process. More particularly, the complaint alleges that the Respondent bargained in bad faith during these negotiations by insisting as a condition of reaching any collective-bargaining agreement that the Union agree to language in the contract that would give the Respondent unilateral control over many terms and conditions of employment and, further, refused to consider the Union's proposals which contained portions of language from the previous collective-bargaining agreement. The General Counsel's complaint also alleges that the Respondent's unilateral implementation of certain portions of its final offer on December 29, 1996, violated the Act. The Respondent avers that its bargaining was not in violation of the Act, that the Union's conduct was itself improper and that its implementation of certain parts of its offer were legitimate and followed an impasse in bargaining.

The complaint also alleges that the Respondent's stopped deducting unit employees' union dues upon the expiration of the contract in violation of the Act. Finally, the General Counsel contend a communication from the Respondent to employees on October 14, 1996, also violated Section 8(a)(5) the Act.

The bad-faith bargaining and unilateral change allegations and the Respondent's response put in issue the entire course of negotiations in the relevant period as well as the larger context of that bargaining. The wider or overall context and pattern of the bargaining as well as the specifics of day-to-day bargaining will therefore be discussed in some detail, infra. The question of whether the 1995–1996 contract's dues-deduction provisions survived its expiration is a separate issue that is best considered apart from the more general bargaining analysis. Also to be considered separately, infra, is the issue whether the October 14, 1996 communication by the Respondent to its employees violated the Act.

B. Events

1. Background

The national and international generation, transmission, and distribution of electrical power—the power industry—has been rapidly evolving in recent times and is expected to continue to evolve in the future. Public ownership or extensive regulation of power utilities is giving way, at various rates, in various ways and in various forms, to a growing trend toward private ownership and deregulation. The industry has been experiencing an increasing rate of mergers, acquisitions, and various other forms of restructuring which is fairly expected to continue in the future. The United States, primarily on a state-by-state basis and with similar variations in the rate of change and the nature of particular changes, is also experiencing deregulation, the onset of competition, and substantial and ongoing business enterprise adjustment.

The Respondent is a public utility or, as the Respondent would characterize, a regulated electric monopoly doing business throughout the State of Oklahoma and portions of the States of Arkansas, Louisiana, and Texas. The Respondent is a wholly owned subsidiary of Central and Southwest Company, an entity owning other electric utilities in Arkansas, Louisiana and Texas including Southwestern Electric Power Company (SWEPCO). Central and Southwest Company, as of the time of the hearing, was contemplating a possible merger with other entities.

The Respondent argued at length that international, national, regional, and Oklahoma State changes in the regulatory envi-

[1]As a result of the pleadings and the stipulations of counsel at the trial, there were few disputes of fact regarding collateral matters. Further, the great bulk of the detailed evidence introduced respecting the mechanics and substance of collective bargaining was not in essential dispute. Where not otherwise noted, the findings are based on the pleadings, the stipulations of counsel, or unchallenged credible documentary, and testimonial evidence.

ronment, including associated areas such as antitrust law as well as changing markets and competitors, fairly contemplated in the future all required the Respondent to reevaluate its long-standing role as a regulated electrical utility in the State of Oklahoma, its business structure and its costs of doing business including the costs of labor.

The Respondent has had a collective-bargaining relationship with the Union[2] for almost half a century covering the following bargaining unit:

> All outside construction and maintenance employees who work on the Respondent's property and power generation employees in operations and in construction and maintenance, excluding clerical employees, supervisory employees and guards.

Over the course of years and as successive collective-bargaining agreements have built upon one another, the contracts have become lengthy and complex incorporating side-agreements and settlements and implicitly incorporating such matters as arbitration awards and interpretations. The most recent contract signed by the parties on October 1, 1995, and effective by its terms until September 30, 1996, runs to one hundred pages.

2. Bargaining for a new contract

Throughout the last half of 1996, the parties regularly met in normal bargaining sessions—some with the assistance of a mediator, conducted smaller group meetings in aid of bargaining and exchanged both correspondence and proposals outside the bargaining sessions themselves.

There is no doubt that the Respondent approached the 1996 bargaining with a determination to reorder its relationship with the Union. The Respondent's brief at page 2 asserts:

> Although the exact impact of full deregulation was unknown at the time bargaining began in July 1996, PSO could see the handwriting on the wall and made proposals designed to meet deregulation head on and to allow PSO to compete on the open market for both power and service. PSO knew that its 50-year-old collective-bargaining agreement, negotiated while PSO was a protected, regulated monopoly, would not give it the flexibility to meet market forces in the Summer of 1996. PSO appointed a negotiating committee to examine the options and to bargain for a more flexible agreement.
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> . . . .
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> Pursuant to the terms of [the expiring agreement], PSO advised the IBEW on July 1, 1996 that it was canceling the agreement, effective October 1, 1996. At that time, PSO explained to the Union that it wanted the flexibility to meet free market competition. PSO outlined the core concepts it believed necessary to meet the challenge of deregulation.

From the beginning the Respondent made its bargaining goals and intentions clear both to its employees and to the Union. Thus, in a videotape played both for employees and the Union at the beginning of negotiations, the Respondent's president and its labor relations representative asserted that the Respondent was determined to make substantial and fundamental changes in its contract with the Union. These changes were designed to enhance flexibility and reduce costs and included, inter alia, stronger management-rights clause language which would allow the Respondent to make changes in terms and conditions of employment without midcontract negotiations or bargaining with the Union.

The bargaining during the relevant period as to the fundamental matters in contest may be fairly characterized as never coming even to conceptual agreement between the parties. Substantial time was spent exploring positions and arguing over the differing approaches taken. Very simply put, the Respondent, although it modified its positions over time, kept to its strong desire to start anew respecting the contract and, to reserve to itself the right to undertake unilateral changes in unit employees' terms and conditions of employment during the life of the contract. The Union at no time in the bargaining in 1996 accepted these core values of the Respondent and/or acquiesced in the fundamental changes the Respondent sought.

While the parties litigated the events of each individual meeting and there was some variance in the testimony of the various witnesses and bargaining notes, the negotiations including proposals, from a slightly more distant perspective, were not in essential dispute. In looking at the negotiations on a meeting by meeting basis, I am particularly mindful of the Board's admonition in *Logemann Bros. Co.*, 298 NLRB 1018, 1021 (1990):

> In addition to the Respondent's proposals, the judge determined that its "recalcitrant posture and bad-faith bargaining was demonstrated by certain statements of the Respondent's negotiators at the bargaining table. Although some statements by negotiating parties may show an intention not to bargain in good faith, the Board is especially careful not to throw back in a party's face remarks made in the give-and-take atmosphere of collective bargaining. "To lend too close an ear to the bluster and banter of negotiations would frustrate the Acts strong policy of fostering free and open communications between the parties." *Allbritton Communications*, 271 NLRB 201, 206 (1984), enfd. 766 F.2d 812 (3d Cir. 1985), cert. denied 474 U.S. 1081 (1986).

Although I have considered the testimony and documentary evidence respecting the details of each bargaining session, I do not find it necessary or desirable to set forth these specifics nor to resolve the minor factual variations regarding those events. Accordingly, save where specifically discussed below, the recitation is limited to a presentation of the broader course of negotiations and the specifics of the various offers and counteroffers at relevant times.

On October 11, 1996, the Respondent's labor relations representative, Johnson, in a lengthy letter to union officials reviewed the Respondent's efforts in bargaining to that point. The letter asserts in part:

> We have engaged in collective bargaining since July 1, 1996. In meeting after meeting, the Company has emphasized the problem of deregulation and sought relief from the current collective bargaining areas:

[2] The Respondent in earlier times recognized three local unions which apparently became the current Union. The Respondent's sister company, SWEPCO, has a collective-bargaining relationship with a different local of the International Brotherhood of Electrical Workers, AFL–CIO.

1. *Management Rights*. The Company has asked for and sought agreement on the notion that greater working flexibility by the members in the bargaining unit will be required in an era of deregulation. This includes the necessity for training and cross-training, rapid flexibility in changing assignments and working shifts, and the reality that jobs in this industry after deregulation may require consolidation, or perhaps the creation of entirely new classifications to meet the changing needs of technology and competition. We have tried several different forms of proposed modification, explaining repeatedly that awhile our goal is flexibility, we will listen to any proposal by you that provides an option to the Company proposals, but which would give us increased flexibility, a solid and reliable "waiver" of some mid-term bargaining obligations under the National Labor Relations Act, and certainty of language that would avoid "second guessing" by contract arbitrators. Your only response to date on these critical issues has been to insist upon preservation of the old collective bargaining contract language, which uses an old style "reserved rights" clause. This style of management rights clause is insufficient under current NLRB case law. Additionally, your proposal will not give us the flexibility we believe is necessary to function and survive in a deregulated environment.

In our view, you are both unwilling and unprepared to give us any of the relief in this are [sic] which we seek, and we are at deadlock.

. . . .

5. *Seniority*. As with earlier items, we have asked for a modification to the language in the current contract agreement which we believe is essential for operations in a deregulated environment, particularly where it is very likely that job classifications may be very different from those currently being utilized, either because of competition or technology. We need the unambiguous ability to put skills first and use seniority as a tie break. You have offered nothing except a return to the old language with minor modifications. We believe we are at deadlock on this issue also.

6. *Benefits*. We have asked for explicit language which would conform the benefits of PSO bargaining unit employees to nothing less (but nothing more) than the level of benefits enjoyed by other PSO employees. PSO employee benefits are purchased with the buying power of the entire Central and South West system and we have heard nothing from your Union to persuade us that the unit employees should be granted or denied benefits any different from the other PSO employees. We can buy the benefits cheaper and better. In the past we have always offered you the option of taking our cost and buying your own benefits. That now seems foolish. At this time, we want the absolute right to buy and change benefits so long as they are no less than those given to all [nonretired] PSO employees.

. . . .

We have repeatedly told you that we were, and remain willing, to consider any proposal that you make. On the other hand, it has reached the point where discussion over issues which do not encompass the areas identified by PSO as crucial to our deregulated future, constitute valuable time wasted. As an example, what in other years would be the absolutely paramount issue, e.g. wages, becomes almost irrelevant to our current negotiations for a renewal agreement if we cannot reach an understanding on the concept that a deregulated environment may mean a complete and total reexamination of the classifications and work assignments being performed by all unit classifications, along with a restructuring that may necessitate the creation of entirely new classifications and job assignments as well as new wage rates during the term of this agreement. Obviously, we hope this will not be necessary, but we have proposed a system which would obligate both of us to engage in good-faith bargaining as concerns any such restructuring, but which would ultimately allow us to restructure as we believe is necessary during the term of this contract should we be unable to reach agreement on the items subject to negotiation. . .

. . . You must understand by this time that PSO will never agree to an old style collective bargaining contract that would lock us in to cost levels which competition could then use as the basis for predatory pricing which would guarantee us the loss of franchises and customer base. Moreover, if we agree to an absolute fixed set of rates with no flexibility, current NLRB law would not allow use to change even if it meant bankruptcy, and we will not agree to any contract where the ultimate decision for the entire Company is left solely in the hands of the Union. . . .

We are aware that our proposal signals a venture into uncharted waters, and represents a staggering departure from 50 years of history. There is no choice. If we lock ourselves into a contract that does not allow for the reality of change, we would be doing all of our unit employees a horrible disservice, and guaranteeing that at some point in the future they will be facing a loss of work because a competitor underbid our prices.

3. The Respondent's contract proposals in late 1996

For purposes of evaluating the counsel for General Counsel's contention that the Respondent sought "language in the contract that would give the Respondent unilateral control over many terms and conditions of employment," it is appropriate to initially examine the Respondent's final offer.[3] Following negotiations on November 15, 1996, the Respondent by letter to the Union dated November 18, 1996, sent a modified contract proposal to the Union.[4] This proposal (the Proposal) was the last

[3] The Respondent's earlier contract proposals, while containing stronger yet similar language, were modified as will be discussed in part infra during the negotiations in response to complaints from the Union regarding the fair interpretation of the provisions of the proposals.

[4] The proposal also gave the Union the option to add certain retired employee coverages and, if employee ratification occurred, allowed a carry over of the former contract's agency shop language.

made by the Respondent in the calendar year and parts of it were implemented at year's end as will be discussed infra.

The Proposal's article I, section 1. recognition clause includes footnote 1, which states in part:

> [A]s a management right, the employer reserves the unilateral right to restructure itself as part of the management's rights, and reform any portion of its business; this includes the merger, sale, consolidation, or splitting apart of any current portion of the operation. Should this occur, the employer reserves the right to take appropriate action before the NLRB to resolve any disputes that may arise concerning representation or unit clarification. Further, this clause shall in no way interfere with the employees', Union's, or the employer's rights under the NLRA, for example the right to seek clarification of the scope of the unit in a "unit clarification" procedure. Finally the employer agrees to engage in "impact bargaining" (as defined in Article I, Section 2(c) upon notification to the Union of any such intended changes.

Article I, section 2, provides at subsection (A) for a contract duration of 2 years from the date of signing by both parties and at subsection (B) for a work stoppage prohibition or no-strike/no-lockout provisions.

Article I, section 2, subsections (C), (D), and (E) provide:

> (C) Entirety of Agreement (Zipper Clause). It is agreed that all subjects of bargaining which may arise after signing this agreement not otherwise expressly covered herein (or as mandated by law) are to be considered waived and settled, and neither party shall have any obligation to bargain on such subjects for the duration of the Agreement. Note: The Company will agree to an obligation to engage in "impact bargaining" over the following issues:
>
> (1) after the exercise of any significant management rights set forth in footnote number one that changes wages, hours, or working conditions of employment;
>
> (2) any changes which will affect working conditions as mandated by state or federal law such as new safety or other federal or state regulations;
>
> (D) "Impact bargaining" for purposes of the Agreement mean only an attempt between the Union and the Employer to reach accord, and shall not include "decision bargaining." Where such bargaining occurs, it shall generally follow the procedure set forth in 3(C)(5) below. Management may set "interim" terms or changes subject to the negotiations;
>
> (E) The term "business reason" as used herein may include but shall not be limited to costs, efficiency, technology, skills, experience, or to beat competition and gain new or hold existing customers.

Article I, section 3, provides:

> Section 3. Management Rights
>
> (A) The Union expressly recognizes that management alone has responsibility for the structure, operation and maintenance of its facilities, may select, schedule, hire, and assign the workforce, determine the work to be done and by which employees, and at what location as outlined herein.
>
> (B) Any and all managerial rights, powers, or authority not expressly abridged by this Agreement are retained by the Employer.
>
> (C) Among the exclusive rights of the Employer are the examples listed below. They shall include but are not limited to, the following:
>
> (1) To determine the number of employees and training qualifications of the workforce, their work times, locations and assignments. To set and/or amend standards of performance, training and operation for any piece of equipment or job assignment for business reasons.
>
> (2) Set and change performance criteria and standards to be used as measurement for the hiring and performance evaluation of employees.
>
> (3) Supervisors or other non-classified employees may perform any bargaining unit work, as the Company determines necessary, but this right shall not be used to permanently supplant regular classified employees.
>
> (4) To develop, post, use, modify and enforce a set of company rules, such as but not limited to, working and safety rules.
>
> (5) For business reasons to define the operational structure, the means, and method of operation, including to right to create work, abolish work, leave it the same, consolidate, transfer, idle, or downsize, and to change job assignments. The Company may modify positions to comply with the Disabilities Act requirements under law. Any such actions. including the creation of new or "blended" positions, which represent a mix of old unit positions or completely new unit jobs and work, shall require "impact" bargaining as soon as practical to determine rates of pay and other issues. However, during this negotiation process, management shall set an interim rate and job assignment which shall be used while the work continues, and later be adjusted pursuant to the outcome of impact bargaining. Further, job titles may be changed unilaterally, so long as pay rates are unaffected.
>
> The parties shall have 45 calendar days to attempt an accord where bargaining is obligated. Should no agreement be reached, the Employer may implement its last offer which shall then become part of the Agreement until the next negotiations which the matter can be reopened.
>
> (6) To judge, evaluate, and grade the working performance of employees and, based on such decisions, assign, promote, demote, transfer, or lay off employees pursuant to business reasons. Any such evaluation and grading of employees shall be job-related and cover those subjects against which the employee will be regularly evaluated. These actions are not disciplinary, and this subparagraph shall not be confused with disciplinary issues as set forth in (7) below.

(7) To suspend, discharge, or otherwise discipline employees for just cause. This process may include mandatory referral to the Employer's Employee Assistance ("EAP") within the guidelines of that program.

(8) After notification to the Union and for business reasons, to provide to any employee or group of employees premium pay or a bonus (which may take any form) above the negotiated wage rates specified in this Agreement. Such premiums or bonus shall not exceed 30% of the annual base wage. The Employer shall determine whether these items shall be given, retained, modified or eliminated.

(9) To select and use the equipment, the processes, tools, machinery, and the like to be used by employees in their employment with the Employer. This includes introduction of new technologies which may or may not change the method of work or otherwise require permanent changes to the workplace and retraining or cross-training. The Employer will engage in "impact bargaining" over any such changes affecting employees after notice and upon request. The Union will be notified of such changes as soon as practicable. Such bargaining shall proceed as set forth in Article I, Sections 2 (D), and 3(C)(5) [quoted supra].

(10) To transfer, contract or subcontract work, in whole or in part, to another employer or employers without restriction for business reasons.

(11) For business reasons, to transfer work to a sister company (or companies) in whole or in part, and also to consolidate or move working crews between this Employer and others, to establish, create, or consolidate any work, work crews, or jobs permanently or on a temporary basis, and to create new positions or eliminate existing positions. The Company agrees that "permanent changes" under this clause require "impact bargaining" (pursuant to the limitations set forth in Article I, Sections 2 (D), and 3 (C)(5). The work shall not be halted pending negotiations.

(12) During states of emergency or outage, to take whatever steps are necessary to resolve the emergency or outage and return customers to normal service.

(D) The ordinary meaning of the words used shall govern when interpreting this clause.

. . . .

Section 7. Grievance Procedure

(B) The decision of the Arbitrator shall be final and binding on all parties, subject to the following:

(1) Neither the Arbitrator nor any reviewing authority shall be vested with the power to change, add to, modify or alter any provision of the Agreement or vary from the rules of construction set forth herein;

(2) No Arbitrator may act as an "interest" arbitrator: Thus if there has been no agreement on an issue, Article I, Section 2(C), shall control and may not be ignored;

(3) Because this is a new agreement, there shall be no attempts to rely on "past practice" from old contracts. All interpretations and awards shall be based only on the language negotiations leading to this Agreement and any practices developed under this Agreement.

. . . .

Section 8. Discipline

(A) Employees may be disciplined and/or discharged by the Employer for just cause which shall be defined as proof that the employee knowingly did the act for which he was disciplined, or otherwise renders the employee unfit for duty.

(B) In the case of any offense or misconduct for which an employee may be discharged, the Employer may impose a lesser penalty and such action does not set precedent for future offenses.

(C) The arbitrator may adjust the penalty only if the Union is able to prove that the Employer's decision was arbitrary and capricious, and not taken for the reasons and the facts stated.

(D) The arbitrator shall abide by this clause, but shall also consider any "after acquired evidence" regarding fitness for duty.

. . . .

Section 10. Company Safety Rules

(A) The Employer shall have the right to establish, modify, interpret, post and enforce company rules, including safety rules, so long as they are created for business and safety reasons and retain the employees' ability to grieve unsafe conditions or refuse obviously hazardous duty in violation of know safety rules or law. The Company shall negotiate "impact" as defined in this Agreement with the Union over newly mandated safety rules.

(B) An employee who fails to comply with such rules shall be subject to immediate disciplinary action, including but not limited to discharge.

. . . .

Section 12. Seniority

(A) As provided by this Agreement and subject to business need, the Employer has the right to make any business decision, except as set forth in (B) below, based on merit. However in any such instance where employees of equal qualifications and/or equal job performance are involved, as evaluated by the Employer, the Employer shall use classification seniority as the tie breaker.

(B) In the event of a reduction in force, said reduction shall be on the basis of classification seniority.

Section 13. Holidays

(A) Employees shall receive the holidays as provided for all Company employees, which may be changed from time to time for business reasons.

Section 14. Vacations

(B) Employees shall receive the vacation days as provided for all Company employees, which may be changed from time to time for business reasons.

Section 15. Personal Leave/Non-Productive Time

(C) Employees shall receive leave time as provided for all Company employees, which may be changed from time to time for business reasons.

Section 16. Medical Insurance

(D) Employees shall receive medical insurance coverage as provided for all Company employees, which may be changed from time to time for business reasons.

Section 17. Life Insurance

(A) Employees shall receive the life insurance provided for all Company employees, which may be changed from time to time for business reasons.

Section 18. Disability Insurance

(B) Employees shall receive the disability insurance as provided for all Company employees, which may be changed from time to time for business reasons.

Section 19. On-the-Job Accident Insurance

(A) Employees shall receive worker' compensation insurance coverage as provided for all Company employees, which may be changed from time to time for business reasons.

C. Analysis and Conclusions

1. Relevant elements of the basic law of bad faith as opposed to hard bargaining

The General Counsel and the Respondent reviewed the recent cases at some length respecting the Board's current position in considering the content of an employer's bargaining proposals in evaluating whether that employer has engaged in good-faith bargaining. In *Reichhold Chemicals,* 288 NLRB 69 (1988), the Board clarified its description of this evaluation process. It noted that without deciding if particular proposals are acceptable or unacceptable to the other party it would rely on its cumulative institutional wisdom in administering the Act to examine proposals when appropriate and consider whether, on the basis of objective factors, a demand is clearly designed to frustrate agreement on a collective-bargaining agreement.

The Respondent correctly points out that in subsequent cases such as *Commercial Candy Vending Division*, 294 NLRB 908 (1989), the Board has asserted it will look to the totality of a party's conduct throughout the negotiations at and away from the table in determining if bargaining positions were taken in bad faith in order to frustrate agreement on a contract and that hard bargaining or rigidity during bargaining does not in and of itself render bargaining a futility.[5]

The General Counsel argues that the Board continues to find bad faith in some circumstances:

> Thus, in *Hydrotherm, Inc*. 302 NLRB 990 (1991), the Board found bargaining in violation of the Act where the Employer sought the Union to surrender to sweeping management rights and a limited "just cause" definition while offering little more than status quo to the Union in exchange. Similarly in *South Carolina Baptist Ministries*, 310 NLRB 156 (1993), the Board found an Employer's conduct "totally evinced its contempt for the bargaining process," where it insisted on proposals that would leave the Union with fewer rights than imposed by law without a contract, made no significant concessions, and advanced proposals which would cut back on existing terms and conditions of employment. [GC Br. 35.]

It hardly needs restating that the Act does not require that parties engaged in collective bargaining reach agreement, agree to a proposal, or even make a concession. It does however require that the parties engage in good-faith bargaining which includes an intention to reach agreement. It is in this setting that the doctrines and cases cited above come into play. To find a violation of Section 8(a)(5) of the Act, the totality of an employer's conduct must be such as to sustain the General Counsel's burden of proof that there was no required intent by that party to reach agreement. In such an analysis proposals must be considered "not to determine their intrinsic worth but instead to determine whether in combination and in the manner proposed they evidence an intent not to reach agreement." *Coastal Electric Cooperative*, supra at 1127.

2. The complaint allegation that the Respondent refused to consider the Union's proposals which contained portions of language from the previous collective-bargaining agreement

The Respondent publicly and consistently took and takes the position that economic circumstances affecting it, both now occurring and in prospect, require it to transform itself and to radically change its manner of operations including its relationship to the Union to the extent it involved the restrictions and obligations it made with the Union as reflected in previous collective-bargaining agreements and the precedents and practices that were in place during the life of those agreements. Importantly, the General Counsel did not challenge the Respondent's sincerity in these beliefs and I take it as a given in this case that the Respondent's oft expressed desire to be leaner, meaner, and more efficient was in good faith and not a simple pretext to cloak its efforts to avoid reaching an agreement with the Union.

Cost-saving proposals such as changes in the manner of calculating and compensating overtime, the elimination of various restrictions on unit work subcontracting and a range of economic proposals which would lower costs were made and generally retained by the Respondent through the negotiations. No one could or can doubt that the Union would not like these proposals and would be fairly expected to oppose or resist them. Given the fact that the Respondent was on an unchallenged campaign to lower costs, I do not find these proposals support the governments claim that the Respondent engaged in bad-faith bargaining. So, too, the nakedly expressed desire of the Respondent, backed up by its contract proposals, to start over or undo the "law of the shop" that had evolved over the previous years of contracts, arbitrations and other agreements and practices, while clearly unsettling to the Union that had been a party to and likely beneficiary in part of this evolving body of law and practice, in my view fits with the Board's determinations in the cases cited above and numerous others that the Respondent's bargaining, while perhaps "hard," does not rise to the level of inherently unlawful or constitute independent evidence of bad faith.

The Respondent's final proposals respecting "just cause" for discipline as quoted above severely limit the traditional limitations on the Respondent contained in its earlier contracts. I

[5] The Respondent further cites more recent cases in this area including, inter alia, *Logemann Bros. Co*., 298 NLRB 1018 (1990), and *Coastal Electric Coooperative*, 311 NLRB 1126 (1993.

agree with the arguments of the Union and the General Counsel that the contract definitions of terms and the restrictions of the arbitrator contained in the Respondent's proposal essentially gave the Respondent employment-at-will powers over employees. Such proposals however were made by the employer in *Coastal Electric*, supra, and found by the Board not to be sufficient evidence of bad faith. Again, guided by such cases, I do not view such "starting over" proposals, even where there is a great variance from previous circumstances, as providing independent support for the government's argument.

Given these findings and conclusions, I do not find that the Respondent engaged in improper or surface bargaining, i.e., bargained in bad faith without intent to reach agreement, in essentially rejecting the status quo and resisting a carryover of language from the previous contract. Whether the Respondent's conduct in this regard is hard bargaining or not, is immaterial, it is not bargaining in violation of the Act. This aspect of the complaint shall be dismissed.

3. The complaint allegation that the Respondent bargained in bad faith by insisting as a condition of reaching any collective-bargaining agreement, that the Union agree to language in the contract that would give the Respondent unilateral control over many terms and conditions of employment

A major element of the Respondent's core concepts was the locus of proposals addressed to its oft expressed desire or need for "flexibility" in managing its affairs during the life of the contract. A part of that desired flexibility was contractual relief from the fetters of the old grievance and arbitration system with its complex history, rules, and practices. Further, the various parts of the Respondent's proposals, which remained essentially unchanged throughout the negotiations, explicitly reserved to the Respondent the right throughout the duration of the contract to unilaterally change certain aspects of the unit employees' terms and conditions of employment. In some cases these rights were set forth in the initial proposals as rights without limit and were in later proposals subject to a "business needs" requirement. In other cases the Respondent's right to make particular unilateral changes was subject only to the proposition that the unit employees' conditions would be identical with, and be changed only in tandem with, identical changes in terms and conditions of the Respondent's nonrepresented employees. Finally a subset of the Respondent's rights to make changes in employees working conditions was limited by a defined "impact bargaining" provision in the contract proposal which essentially provides for the Respondent's right to implement certain changes with a set period of "impact bargaining" to occur thereafter after which, if no agreement is reached, the Respondent's action is not susceptible to further challenge for the life of the contract. The range and degree of these enumerated powers as set forth in the Respondent's proposals and in its final proposal as quoted in part above, is quite extraordinary and includes the right to unilaterally change broad aspects of the unit employees terms and conditions of employment during the life of the contract.

The Act imposes upon an employer within its jurisdiction the obligation to bargain with the exclusive representative of its unit employees in respect to rates of pay, wages, hours of employment, and other conditions of employment and, if agreement is reached, to reduce to writing and sign such an agreement. Employees have the right under the Act to engage in concerted activities for the purpose of collective bargaining or other mutual air or protection. The right-to-strike in support of bargaining demands is perhaps the most traditional of such activities. It is traditional for the union to negotiate an agreement with an employer in which the employer binds itself to agreed-upon terms and conditions of employment enforceable by a grievance and arbitration clause and the union gives up the right to engage in work stoppages or strikes. In the instant case the proposal of the Respondent contains the usual restriction on the Union and employees right to strike in support of its bargaining demands during the contract, but, as a result of the limitations within the contract as proposed, reserves to itself with little practical limitation the right to change employees terms and conditions of employment.

Without a contract an employer subject to the Act's strictures must notify and bargain with the labor organization representing its employees before changing those employees' terms and conditions of employment. As noted, supra, a union that has not contractually limited its right to strike, may do so in aid of its efforts to obtain its bargaining demands. Under the contract as proposed by the Respondent not only does the Union lose the right to strike, it also loses the right to collective bargaining over the many and significant changes the Respondent is entitled to make under a fair interpretation of the Respondent's proposed contract provisions.

In a fundamental sense, the contract proposed by the Respondent would profoundly diminish the union's role as representative of unit employees as defined by the Act and as traditionally practiced in modern labor relations. I have earlier indicated the Respondent's fundamental motivations are not under challenge here. It may be argued, as is implicit in the Respondent's expressed rationale for its proposals, that traditional specification of terms and conditions of employment for set periods within the life of the contract and notification and bargaining as well as grievance processing and arbitration during the life of the contract regarding new matters or disputes will have a marked tendency to delay management's ability to rapidly adjust to market conditions. Thus, it may be argued, the old ways of labor relations negotiations ad nauseum and frequent contract disputes is no way to run a lean fast moving business enterprise in a time of increasing competitive and technological change. The need to notify, bargain and compromise with the Union in the face of the perceived need to change because of contractual and statutory restrictions on the employer's right to make unilateral changes: all such limits may be characterized as a part of the inefficiencies of American industrial relations, workplace regulation and general governmental restriction. For good or ill, however, Congress in its wisdom has crafted the Act and, as interpreted by the Board under review by the courts, it is the law of the land. The argued need for an employer to have the right to take unlimited actions regarding the unit is not a sufficient basis under the Act for insisting on contract proposals which essentially set aside the bargaining rights of a union representing an employer's employees.

As counsel for the Respondent argued at the trial and on brief in greater depth respecting this aspect of the case: If the Respondent's demands were hard for the Union to accept, so what? The proposals are admittedly mandatory subjects of bargaining. Fundamental union rights such as the right to strike or the right to bargain about midcontract matters are regularly given up by labor organizations in return for a collective-bargaining agreement in negotiations across the land. Indeed the Union involved herein had earlier agreed to a contract very similar to that proposed by the Respondent with another employer, which fact was known by the Respondent in framing its proposals and was a subject of repeated discussions during bargaining. The Respondent further argues its proposals were simply part of what was, at worst, hard bargaining. The Union was not forced to accept the proposals and was free to offer counterproposals and to take proper action including the holding of a strike in support of its own bargaining demands.

It is true as the Respondent argues that if the Board has on occasion in the past attempted to characterize certain aspects of a union's statutory rights as somehow sheltered in bargaining in the face of court opposition this is generally no longer the case. The Board has not, however, abandoned its long-held view that those rights the Act provides a labor organization representing unit employees, i.e., those extant by operation of statute without a contract in place which may redefine the rights and obligations of the parties, may not be simply stripped from a union damaging its ability to function as the active representative of the employees and putting the union and the employees in a worse position without a contract than with one. An employers proposals to so limit union rights will be viewed with great caution. See, e.g., *Wright Motors*, 237 NLRB 570, 575–576 (1968), enfd. 603 F.2d 604 (7th Cir. 1979). See also *A-1 King Size Sandwiches,* 265 NLRB 850 (1982), enfd. 732 F.2d 872 (11th Cir. 1984), cert. denied 469 U.S. 1035 (1984), fn. 23 at 861 which asserts in part:

> Indeed, it may be seriously questioned whether a proposal wherein one party retains the right to unilaterally change virtually every significant aspect of the working relationship during that "contract's" term, while the other party is rendered helpless to oppose such actions, is a proposal for a *collective-bargaining agreement*. [Emphasis in original.]

This concept of an employer's proposals rising to the level of a bad-faith effort to strip a union of its statutory rights is not simply an artifact of pre-*Reichhold* case law. The Board in *South Carolina Baptist Ministries*, 310 NLRB 156, 157 (1993), in a "totality of conduct" analysis asserted: "Finally, we note that the Respondent insisted on proposals which would leave the Union with far fewer rights than imposed by law without a contract.[Footnote omitted.]" In *Coastal Electric Cooperative*, 311 NLRB 1127 (1993), a case cited by the Respondent for the extent to which the Board now finds an employers' proposals permissible hard bargaining as opposed to violative conduct, the Board, id. at fn. 5 1127–1128, emphasized that its finding of a violation in *South Carolina Baptist Ministries,* supra, was based in part on the employers "insistence on proposals leaving the union with fewer rights than provided by law without a contract." And in some cases such as *Logemann Brothers Co*., supra, 298 NLRB 1018 (1990), another case relied on by the Respondent in which hard bargaining rather than surface bargaining was found, the Board has expressly noted, citing *A-1 King Size Sandwiches*, supra, that while not found in the particular case, it remains the Board's view that employer proposals so comprehensive as to preempt a labor organizations representation function and leave employees less well off may rise to the level of bad-faith bargaining.

Other aspects of the Respondent's argument warrant consideration in this context. First the Respondent notes that it was to a degree simply tracking in its own 1996 bargaining proposals the Union's contract of many years with another employer, Kiwash, a nonprofit cooperative utility with some 11-unit employees operating in Oklahoma. The Respondent argues that the Union and the General Counsel may hardly object to the Respondent proposing that which the Union had agreed to with a competitor, maintained for many years and reentered into in March of 1995. The Respondent notes that in *Logemann Bros. Co.*, 298 NLRB at 1020, the Board specifically found relevant and supportive of the employer's claim of good faith in making proposals the fact that the labor organization had agreed to virtually identical language with another employer.

The Union witnesses noted that the Kiwash contract was frequently discussed in negotiations and advanced as a supporting rationale by the Respondent's negotiators for its proposals. The Union's argument in negotiations and before me is that the contract with this small provider with perhaps fewer than 2 percent of the Respondent's unit complement and no significant power generation or transmission operations was immaterial to the negotiations at issue herein. The Union also argued that the Union's relationship with Kiwash at relevant times was much smoother and free from contention and dispute as compared and contrasted to the Union's historic relationship with the Respondent. Further, the Union argued that it believed that the Kiwash contract had resulted in the Union's loss of that bargaining unit inasmuch as the employees complaints that they had no power under that contract led, in the Union's mind, to a loss of employee support, a decertification petition, and an ultimate union disclaimer of interest in continued representation of employees in that unit. In short, the Union argued the Kiwash contract was an historical mistake for the Union and the employees it represented at Kiwash, but that in all events the contract was immaterial and irrelevant to the 1996 negotiations with the Respondent and that its negotiators repeatedly told the Respondent's negotiators that this was true throughout the negotiations.

The Respondent is certainly correct that its proposals must be examined in context and that the Respondent's use of language taken from or modeled after language in the Union's contract with a competitor is relevant to such an analysis. The Union's argument that the Kiwash contract's signatory employer, the historical context in which that contract was arrived at, and its ultimate negative impact on the Union's representation of that unit, in each instance, was so profoundly different from the situation confronting the 1996 Union-Respondent negotiations as to render the Kiwash contract simply immaterial to the negotiation at issue herein is also effective. Considering the arguments of the parties and the cases cited as well as the record as a whole on this issue, I find that as a factor in considering the propriety of the Respondent's proposals, the Kiwash agreement was an ameliorating factor in the early stages of the negotiations when the Respondent was preparing and proposing its initial contract offers. I find further, however, that as the negotiations progressed and the Respondent made its arguments on the Kiwash contract and heard the countering arguments of the Union's agents attacking the relevance of the Kiwash language to the 1996 negotiations between the Respondent and the Union, the Respondent came to know, or reasonably should have known, that the Union believed and had reason to believe that the Kiwash contract was not a relevant basis on which to reach agreement. In making this finding, I find that the circumstances between the two employers, as advanced by the Union and the General Counsel were sufficiently different by the later stages of the negotiations, and were known or should have reasonably been known by the Respondent to be sufficiently different so as to effectively diminish the fact of parallel language in the Respondent's proposals as a defense to the allegation at issue.

The Respondent also argues that the Respondent made concessions and changes in its proposals, solicited counteroffers from the Union side which would meet its "core needs" and was generally neither inflexible nor preemptory during negotiations. The Respondent argues further that the Union essentially failed to answer those solicitations for counteroffers throughout negotiations and rather was itself inflexible and uncooperative. Limiting consideration at this point to the proposals dealing with the Respondent's desire to have the right to unilaterally change terms and conditions of employment as opposed to other areas of negotiations, I do not accept the Respondent's argument.

As noted supra, the Respondent's negotiators made it clear from the onset of negotiations that its unalterable "core concepts" included gaining a large measure of control over unit employee terms and conditions of employment and reserving the right to initiate a wide variety of changes in those conditions during any contract's life without giving the Union more than an essentially after the fact, consulting role in some of the changes and explicitly denying the Union any role whatsoever in others. At no time did the Respondent modify its position that the Union was to have no role in establishing or maintaining many fringe benefits. Thus, the Respondent would commit itself only to treat unit employees as it treated its other nonrepresented employees, changing all employees' various benefits at will. As to other areas where the language of the Respondent's proposals were modified over time, the government and the Union argue correctly that the changes in the Respondent's proposals which went, for example, from preserving the Respondent's unfettered rights to make certain changes to limiting the right to those situations wherein the Respondent had "business reasons" to take action, is simply no change at all: a distinction without practical difference. So, too, the Respondent's "impact bargaining" procedures, while touted as a control sharing compromise, was rather simply a change of form again without change in substance for it left the Union no rights to true bargaining in a statutory sense, but rather limited it to a narrowly defined postevent consultation procedure at the conclusion of which the Respondent's already initiated clusion of which the Respondent's already initiated changes became permanent for the life of the contract. These clauses did not in fact realistically limit the Respondent's power to act unilaterally and gave the Union no real power akin to the rights it had under the Act. In such a setting, the fact that the Union did not respond to the Respondent's negotiators call for counteroffers consistent with the Respondent's "core needs" is both readily predictable and, as such, is not of significant relevance to a total conduct analysis as required by the allegation of the complaint. Thus, I do not find the Union's bargaining proposals or bargaining table conduct is a significant factor in resolving the bargaining allegations herein.

The Respondent argues further, however, that the Union engaged in away from the table misconduct which warrants a finding that the Union itself was engaging in bad-faith bargaining which is a defense to the violations alleged. Thus, the Respondent argues that its negotiators discovered the existence of a union manual or plan of action in December 1996, entitled the *Inside Game: Winning With Workplace Strategies*, which revealed both an improper motivation of the Union in avoiding agreement and a course of conduct by the Union in encouraging employee misconduct at the workplace during bargaining. The Respondent citing, inter alia, *National Steel & Shipbuilding Co.*, 324 NLRB 499 (1997), and *National Steel & Shipbuilding Co.*, 324 NLRB 1031 (1997), argues the manuals teachings rise to the level of unprotected conduct and in consequence the Union should be held guilty of wrongdoing not the Respondent.[6]

The Board has dealt with inside game tactics in various settings. See, e.g., *Central Illinois Public Service Co.*, 326 NLRB 928 (1998); *Caterpillar, Inc*., 324 NLRB 201 (1997), and *Caterpillar, Inc*., 322 NLRB 674 (1996). I find it is unnecessary to reach the "manual" issues raised by the Respondent because I do not find a sufficient evidentiary nexus between the manual and the conduct of the Union on this record. As noted at the beginning of the recitation of details of bargaining, I have considered, but not found of great significance the "bluster and banter" of various negotiators during the negotiations. Considering the evidence offered by the Respondent, in the context of the record as a whole, I simply find insufficient evidence that the Union initiated the course of conduct the Respondent advances. While there may well have been some "bluster and banter" at union meetings, I simply find the totality of the evidence in this area does not persuasively suggest that the Union engaged in a course of conduct—consistent with certain por-

[6] The Respondent had filed various charges against the Union with the Region, some of which remained before the General Counsel respecting these allegations. I held at trial and here reaffirm that, while any and all evidence relevant to Respondent's defense could be offered in the instant case, the content of the Respondent's charges against the Union before the General Counsel was not—above and beyond the evidence offered in those charges which was or could have been on offer herein—relevant simply because it had been submitted to the Agency in support of a charge against the Union. The charges filed against the Union by the Respondent are the business of the General Counsel in exercising his plenary control over complaints, the relevant evidence of the Union's misconduct in the bargaining involved herein is relevant whether or not changes against the Union had been filed.

tions of the Inside Game manual—that rises to the level of significance in deciding the issues of the complaint herein.

Considering the totality of the Respondent's conduct, including all the noted factors and arguments in the light of the cases cited by the parties as well as on the record as a whole, I find and conclude as follows. The bargaining at issue herein was regular and no particular "bluster and banter" by either side is of significance. The Respondent's insistence on new language, new policies or, in effect, a de novo contract is not, in and of itself, an adverse indicium where, as here, no challenge to the rationale asserted by the Respondent for the approach was offered. Nor were the Respondent's broad and significant economic proposals to reduce costs such as the reduction in total overtime payments improper. As all have noted, hard or tough bargaining is not a violation of the Act. Although not discussed above, neither did I find the Respondent's "last hour" efforts to precipitate agreement of particular significance to the allegation at issue. It may be said in a summary fashion that I simply did not find the bargaining on either side fell outside the limits of conduct permitted under the Act.

The single issue respecting the General Counsel's challenge to the Respondent's bargaining style with which I have trouble is the extent to which the Respondent's course of bargaining and, in particular, its final proposals sought as an inflexible goal, or in its nomenclature a "core concept," the achievement of essentially unfettered flexibility in managing its business by being able to make sweeping changes in employees terms and conditions of employment during the life of the contract. I have found that the changes proposed in these regards would, in their totality, in effect, very significantly reduce the Union's role in representing employees. I found that the Respondent's "safeguards" allegedly inserted into its proposals to protect union rights, such as the need for the Respondent to have a "business reason" to take certain actions and the establishment of an "impact bargaining" procedure in lieu of traditional bargaining, were simply ineffective in providing actual rights to the Union and do not in reality diminish the extent of the abdication of representational rights the Union's acceptance of the proposals would require.

Having undertaken a totality of conduct analysis, I find that the offering, insistence, and dogged defense of these proposals by the Respondent as described above—and without considering in this analysis the additional suggestions of misconduct made by the Union and the General Counsel against the Respondent rejected above—is so comprehensive an effort to preempt the Union's representational function as to sustain a finding of bad-faith bargaining.

I recognize the cases have generally found such a violation in the context of other improper conduct. Here I simply find that the Respondent has overreached itself. Convinced of the need to be lean and agile, having made its own earlier and ongoing efforts to become more efficient, the Respondent likely concluded that it was in its best interests and even in the best interest of its employees that it explicitly obtain the power and right to adjust essentially all aspects of unit employees terms and conditions of employment without let or hindrance from the Union. This may or may not be sound business acumen, it is not for me to judge.[7] It is however inconsistent with the scheme of unit employee representation and collective bargaining contemplated by the Act. To insist on its way in these regards, as the Respondent did through the course of negotiations as described above, was bad-faith bargaining in violation of Section 8(a)(5) and (1) of the Act and I so find. This element of the General Counsel's complaint is sustained.

4. The complaint allegation that the Respondent wrongfully implemented certain portions of its final offer in December 1996

There is no doubt that the Respondent implemented certain portions[8] of its last offer to the Union in December 1996. The Respondent defends its actions by asserting the correct statement of law that an employer may implement elements of its last offer upon the occurrence of an impasse in bargaining. I have found infra, however, that the Respondent engaged in bad-faith bargaining by insisting in late 1996—commencing well before the alleged impasse—on contract proposals which would significantly reduce the Union's role in representing employees. The counsel for General Counsel and the Union argue, and it is conventional bargaining law, that no impasse in bargaining may be found to have occurred where an employer was found to have been engaging in bad-faith bargaining prior to the time of the challenged impasse. The counsel for the General Counsel argues further on brief at 38:

> [The Respondent's] piecemeal implementation of portions of its last offer, absent a bona fide impasse, was unlawful. *Bottom Line Enterprises*, 302 NLRB 373 (1991); *RBE Electronics of S.D., Inc*., 320 NLRB 80 (1995).

The General Counsel's citation of authority given the finding of no impasse is correct and applicable herein. The record is clear that the Respondent's wrongful insistence on the Union's essential abandonment of its rights to establish by contract and thereafter to bargain over changes in employees working conditions prevented the parties from engaging in meaningful bargaining at the end of 1996 and that no state of impasse may be said to have existed during that period. Since the Respondent's changes were implemented at a time when no valid impasse existed, I find that the Respondent's implementation of portions of its last offer in December 1996 violated Section 8(a)(5) and (1) of the Act. This element of the complaint is sustained.

[7] In many ways the arguments of the Respondent here are similar to the arguments of employers early in the history of the Act that entrance into collective-bargaining agreements would unreasonably limit employer freedom of action.

[8] The General Counsel amended his complaint to more accurately address the specifics of these changes and the position of the General Counsel and the Respondent at the conclusion of the hearing were not at significant variance. I find it is not necessary to make detailed findings respecting what changes were implemented beyond the great bulk of the alleged changes which are uncontested. As necessary remaining contentions respecting the specific changes made may be determined in the compliance stage of these proceedings.

5. The complaint allegation that the Respondent's discontinuance of deducting unit employee's union dues upon the expiration of the contract violates the Act

The expiring contract had the following provisions respecting union dues and checkoff:

Article III Company Rights—Union Rights

Section 1.(A) . . . no employee, and no one seeking employment, shall be required as a condition of employment, to join any Union or refrain from joining, organizing or assisting a labor organization . . .

. . . .

Section 6. Maintenance of Membership

(A) When an employee covered by a classification scheduled herein become a member of thee Union . . . a condition of their [sic] employment shall be that the employee pays their [sic] dues to the Union during the duration of the Agreement . . .

. . . .

Section 8. Dues Check-Off

The Company agrees to deduct from each authorized employee and turn over to Local 1002 I.B.E.W. the regular monthly dues of such employee. Before any such deduction may be made, the Union shall obtain and deliver to the Company the signed voluntary written authorization of the employees for whom said deductions are to be made. Monthly dues (not including initiation fees, fines, or assessments) shall continue to be deducted until the employee gives written notice to Public Service Company of Oklahoma and Local Union 1002. Such withdrawal shall become effective on the first of the month following receipt of the notice by the Company.

As the October 1, 1996 contract expiration approached, the Respondent notified the Union that it intended, inter alia, to discontinue checkoff on October 1 and the Union initially agreed. The Respondent did in fact discontinue checkoff on that date. Thereafter in December however, the Union argued to the Respondent that its cessation of dues checkoff was illegal. The Respondent did not and has not resumed checkoff and the Union filed the charge in Case 17–CA–18967 on January 23, 1997, respecting the matter.

The General Counsel argues on brief at 39 that after contract expiration, a provision for dues checkoff, like any other mandatory term and condition of employment, remains subject to bargaining before it can be changed and that under *NLRB v. Katz*, 369 U.S. 736 (1962), an employer violates Section 8(a)(5) of the Act by unilaterally instituting changes not previously discussed to impasse The General Counsel notes that union-security provisions—which includes maintenance of membership provisions as appears in the expired contract—are permissible under the Act only where supporting contractual provisions are in place and therefore such provisions end with the expiration of such a contract. The Board, as noted by the Respondent, has held that dues-checkoff provisions implementing union-security provisions likewise end with the contract citing *Bethlehem Steel Co.*, 136 NLRB 1500 (1962), enfd. on other grounds sub nom. *Marine & Shipworkers v. NLRB*, 320 F.2d 615 (3d Cir. 1963), cert. denied 375 U.S. 984 (1964).

The General Counsel government argues that in the instant case the language of the check-off provision of the expired contract is separate and independent from the maintenance of membership provision and therefore the two provisions should not be regarded as "linked." Given their independence, argues the counsel for General Counsel on brief at 40:

> While Section 8(a)(3) of the Act permits enforcement of union security provisions of a collective-bargaining agreement, Section 8(a)(3) does not tie union security to dues-checkoffs. Section 302(c)(4) permits dues-checkoffs which are voluntary and revocable and appears to permit the employer to continue payments to the union until written revocations are received. These kinds of wage payments to the union are privileged and neither Section 302 nor the proviso to Section 8(a)(3) requires that they cease when the contract expires. There is no portion of the statute which provides that it is unlawful for an Employer to continue dues-checkoffs after the agreement expires when the dues-checkoff authorizations have not been revoked. Significantly, dues-checkoff provisions are frequently agreed to and enforced in right-to-work states, where union security would be unlawful. Going back through the applicable legislative history, it is apparent that Congress enacted Section 302 as a restriction on unions' ability to exact money without safeguards such as are found in subsection (c)(4) and that, while ". . . dues-checkoff was usually ancillary to union security agreements . . . [it] may [also] stand alone in lieu of any other union security provision."[33] The legislative history of Section 302 supports the view that dues-checkoff authorizations continue indefinitely until revoked.[34] There does not appear to be anything in the statute or the legislative history to support the proposition that an employer is free to unilaterally discontinue unrevoked dues-checkoff authorizations once the collective-bargaining agreement containing the applicable union security provision expires.

[33] *Electrical Workers IBEW Local 2088 (Lockheed Space Operations),* 302 NLRB 322, 326 (1991).

[34] See extensive discussion of the statutory scheme and the legislative history related to union security and dues-checkoffs in *Lockheed Space Operations*, supra at 324–327; *Frito Lay*, 243 NLRB 137, 138–189 (1979). See, also, *Air La Carte, Inc.,* 284 NLRB 471 (1987); II Leg. Hist. 1304, 1311 (1947).

The General Counsel further supports this argument on brief with a learned marshaling of various authority which, he argues, "suggests," is analogous to, or indirectly supports, the asserted proposition. What is not explicitly admitted by the General Counsel, but seems clear from his argument, is that the Board has not squarely adopted his argument in prior cases.

The Respondent strongly rejects the argument of the General Counsel asserting that the law is clearly to the contrary and argues further on brief at 62:

> Finally, the [General Counsel of the] NLRB is attempting through litigation what should be done through the rule-making process of the Administrative Procedures Act, 5 U.S.C. § 553, because the issue of dues check off would be

> rule making and not a matter for litigation. This matter of the agency making a statement of general or particular applicability and future effect designed to implement, interpret or prescribe law or policy, and because of the dramatic departure from the prior decisions of the Board in cases such as *Bethlehem Steel*, 136 NLRB 1500 (1962, enforced on other grounds sub nom. *Marine & Shipworkers v. NLRB*, 320 F.2d 615 (3d Cir. 1963), cert. denied 375 U.S. 984 (1964), the agency should here be estopped from attempting to change approximately 30 years of NLRB policy particularly on a retroactive basis without rule making.

The General Counsel's argument in this aspect of the case is scholarly and may well ultimately prevail. I do not, however, accept the General Counsel's premise implicit it his argument that he is not seeking to change Board law. In examining the cited cases, I find the distinctions the General Counsel is attempting to make do have a factual basis in the evolution of the doctrine at hand. I find however that the Board has not addressed, let alone made or relied on those distinctions in its analysis of these issues in the cases to date and rather has consistently simply held as in *J. R. Simplot*, 311 NLRB 572 (1993):

> It is well settled that an employer's obligation to abide by the terms of a checkoff provision ceases with the expiration of the contract. See *Bethlehem Steel Co*., 136 NLRB 1500 (1962), enforced in relevant part 320 F.2d 615 (3d Cir. 1963), cert. denied 375 U.S. 984 (1964).

The Board continues to cite *Bethlehem* broadly for the cited proposition.

Given all the above, I find that the Board has not drawn the distinctions advanced by the General Counsel and, at least to date, has consistently found that dues-checkoff provisions expire with the contract. As an administrative law judge I am bound to follow Board law. While a judge may draw further distinctions and refinements in areas not yet fully considered by the Board, he or she may not simply set aside Board doctrine which applies to the issue no matter how attractive might be the proffered arguments. Since I find the Board's rulings unambiguous on this issue, I decline to further consider the General Counsel's arguments. This element of the complaint shall be dismissed.[9]

6. The complaint allegation that the Respondent's October 14, 1996 communication to employees violated the Act

The Respondent maintains an internal electronic mail system with which it communicates with its employees. On October 14, 1996, it disseminated to employees a communication (generically referred to as a PROF), which stated in part:

> From: PSO Corporate Communications
> Depth: Corporate Communications
> Subject: Union Seeks to Regain Ex-Members,
> Gain New Members
>
> PSO has received several questions concerning a letter dated October 1, [1996] from IBEW Local 1002 business manager Lonnie Sullivan to all union stewards, which announces an "internal organizing drive" to encourage ex-members to rejoin the union. It also is intended to attract new members.
>
> For the month of October, the local is waiving admission fees and payment of back dues older than six months. This action, while very unusual, is largely internal union business. The following questions and answers are intended to shed some light on the issues, and answer questions voiced by employees.
>
> . . . .
>
> Q. What business is it of PSO's if the union is offering an incentive for ex-members to rejoin?
>
> A. None at all . . . with the very large exception that this action taken by union leadership raises questions as to whether the union still represents the majority of employees who work in jobs covered by the collective-bargaining agreement.
>
> Q. Why does it matter whether employees have dropped out of the union or not?
>
> A. If the union no longer represents a majority of employees, there should be an election conducted by the National labor Relations Board to let employees decide for themselves if they still want union representation.
>
> Q. Can PSO call for such an election any time it wants?
>
> A. No. We need to show the NLRB objective evidence of any good faith doubt. This can be done if a significant number of employees in the bargaining unit let PSO know that they do not want a union.
>
> All employees in jobs covered by the union contract, whether or not your are currently a union member, may send a PROFS note to Pat Johnston, PROFS ID—PHJOHNSTO or a note to Pat Johnston using intercompany mail marked "confidential" to Pat Johnston, GO 1-NE. If you are interested in doing this, the note should state your name, and that you no longer want to be represented by the union. The information received will be held in confidence and provided only to the National Labor Relations Board.
>
> We emphasize that employees should only respond to this note if they no longer feel the union is representing them. No one should feel any pressure to respond on way or another, and the employees should not discuss this issue with any supervisory personnel, no matter what their decision.
>
> PSO Corporate Communication

The General Counsel argues on brief:

> It is submitted that such a solicitation is not the exercise of free speech but rather constitutes coercive interro-

[9] In reaching this result, I reject the Respondent's argument that a change in Board law must come through rulemaking rather than by means of an unfair labor practice case decision. The Board may well chose either means, and is clearly not obligated to forgo changing the law on a decisionmaking or case-by-case basis. Rather, while I find the Board may consider the General Counsel's arguments, since such consideration involves contemplation of a change in Board holdings, an administrative law judge, including this one, may not undertake such a consideration. The General Counsel therefore must press on to the Board to have its arguments on this element of the complaint fully considered.

> gation in violation of Section 8(a)(1) of the Act. Thus, Respondent, by asking employees to disclose their union sentiments, unlawfully solicited them to abandon the union, a classic violation of the Act. *Central Management Co.,* 314 NLRB 763, 767 (1994); See also, *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 686 (1944).

The Respondent answers:

> On October 14, 1997, PSO put out a note to employees through its intracorporate communications system. [Exhibit 83]. These are commonly referred to as PROF's notes. The Board alleges the PROF's note constitutes an impermissible communication with Union members.
>
> The communication does not solicit revocation of cards in violation of the rules in cases like *Livingston Pipe & Tube, Inc*., 303 NLRB [873] [secondary citation omitted] (1991). Rather, it follows the rule of *Avecor, Inc*., 296 NLRB [727] (1989), where management merely passed out instructions. Such conduct is protected free speech. See, *NLRB v. TRW Semiconductors*, 385 F.2d 753 (9th Cir. 1967), denying enforcement to 159 NLRB 415 (1966).
>
> The PROF's note at issue was in a question and answer format designed to address questions being presented to PSO's supervisors at the job site. The question and answer format does not encourage Union members to take any action, but merely explains several necessary process to employees on how to exercise their legal rights.

In *Central Management Co.,* 314 NLRB 763, 767 (1994), supervisors solicited employees to sign a petition "to oust" the union. The Board found this constituted an unlawful solicitation of employees to abandon the union, a "classic" violation of Section 8(a)(1) of the Act citing *Medo Photo Supply Corp.,* supra, at 686. The Supreme Court in *Medo* however dealt with a situation where the employer had agreed to wage increases for the employees who abandoned the union.

Because the General Counsel's complaint only alleges in conclusionary terms that the Respondent's conduct interferes with, restrains, and coerces employees in violation [of] Section 8(a)(1) of the Act there is some conceptual ambiguity both in the precise nature of the violation alleged and in the parties' argument thereon. It is well to consider what is at issue and eliminate some clearly unpersuasive arguments. First, despite the language of the communication, the communication is neither attacked nor defended as a poll of employees.[10] The Respondent contends it merely "passed out instructions" to employees on how they could express their opposition to the Union, a procedure found not to violate the Act in *Avecor, Inc*., 296 NLRB 727 (1989). I do not find the Respondent's conduct qualifies as simple instructions to employees on how to represent their views to the Union as in *Avecor*. In *Avecor* the employer provided a form letter to employees which could be sent independently by an employee, if he or she desired to do so, directly to the Union without the employer knowing which employees did or did not undertake the action, As the judge noted, at 296 NLRB 734, there was "no evidence Respondent attempted to ascertain who used the letter." Finally, unlike the *Medo* case, no direct threats or promises of benefits to unit employees accompanied the communication in the instant case.

The allegation seems to contend that the Respondent's actions constitute an improper solicitation of antiunion sentiments from employees. As quoted above, the General Counsel argues on brief the conduct: "unlawfully solicited [employees] to abandon the union." The Board noted in *Bennington Iron Works*, 267 NLRB 1285, 1286: "It is a settled principle that the Act proscribes an employer or its agents from soliciting support for an antiunion petition." The context of the instant communication is in my view different to a degree from a direct solicitation to take a certain action. While the issue is not free from difficulty, I find on this record I need not reach the question of whether or not the quoted communication rises to a violation of the Act as a solicitation—not as an interrogation—purely because of its impetus to antiunion actions by employees.

I reach this conclusion because, relying on the General Counsel's further characterization on brief as quoted above that the conduct was also a "coercive interrogation," the conduct must also be considered under the analysis in the General Counsel's cited case: *Central Management Co.,* supra. In that case the judge, at 779, with Board approval, held that the employer's solicitation of employees to sign a petition to oust the union, which petition was posted where the employer's agents could observe who was signing the petition, constituted coercive interrogation because it put the employees in the position of having to make an "observable choice" in signing or not signing the petition. In the instant case, the Respondent was soliciting employees to convey a desire to get rid of the Union to management itself. What was a violation in *Central Management,* because the employees actions in signing a petition where management could see them sign, is surely equally a violation when the solicited employee expressions of opposition of continued representation by the Union were to be made directly to the Respondent's agent. Accordingly, I find under the Board's decision in *Central Management Co.,* supra, that the Respondent herein coercively interrogated its employees by soliciting them to make an "observable choice" respecting their desires to have the Union continue to represent them. On this basis I sustain the allegation of the complaint that the Respondent's communication violated Section 8(a)(1) of the Act as a coercive interrogation of employees.

7. Summary and conclusions

Respecting the allegation of paragraph 4 of the complaint that the Respondent violated Section 8(a)(1) of the Act by wrongfully communicating with its employees by electronic mail on October 14, 1996, I found that its communication was a coercive interrogation of employees respecting their continuing support for the Union and violated Section 8(a)(1) of the Act.

[10] The law is clear that an employer may not initiate a poll of employee sentiments in an attempt to create—as opposed to confirm—a good-faith doubt of the union's continuing majority support among employees. See, e.g., *Allentown Mac Sales & Service v. NLRB*, 83 F.3d 1483 (D.C. Cir. 1996); *Thomas Industries v. NLRB*, 687 F.2d 863 (6th Cir. 1982); *Henry Bierce Co*., 307 NLRB 622 (1992). The Respondent made no claim in this proceeding to having had a good-faith doubt of the Union's majority at relevant times.

Respecting the allegation of paragraph 6 of the complaint that the Respondent wrongfully ceased deducting union dues from unit employees' paychecks pursuant to voluntary written employee authorizations at the expiration of the contract containing union dues-checkoff language in violation of Section 8(a)(5) and (1) of the Act , I found the Respondent's cessation of dues deductions did not violate the Act.

Respecting the allegation in paragraph 6 of the complaint that the Respondent bargained in bad faith with the Union when it refused to consider union proposals which contained portions of language for the previous collective-bargaining agreement, I found that the Respondent did not violate the Act.

Respecting the allegation in paragraph 6 of the complaint that the Respondent bargained in bad faith with the Union when it insisted as a condition of reaching any collective-bargaining agreement, that the Union agree to language in the contract which would grant the Respondent unilateral control over many terms and conditions of union employees employment, I found that the Respondent in bargaining in 1996, considered as a whole and with a focus on the state of bargaining in December 1996, evinced an intention to usurp the Union's statutory right to bargain over changes in unit employees' terms and conditions of employment during the contract period, and in so doing sought to render both the Union and the represented employees significantly less well off in terms of statutory rights under a new contract than they would be without one. I further found consistent with the cases cited infra that such bargaining violated the Respondent's obligation to bargain in good faith with the Union over the terms of a new collective-bargaining agreement and, therefore, violated Section 8(a)(5) and (1) of the Act.

Respecting the allegation that the Respondent implemented portions of its last offer in December 1996 at a time when no valid impasse had been reached, I found as follows. In consequence of the Respondents bad-faith bargaining, I found that no impasse in bargaining occurred in 1996. Inasmuch as there was no dispute that the Respondent implemented portions of its December 1996 offer to the Union in December 1996 and thereafter without the consent or agreement of the Union, I found that, as to those changes, the Respondent has further breached its duty to bargain in good faith in violation of Section 8(a)(5) and (1) of the Act.

REMEDY

Having found Respondent engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action necessary to effectuate the purposes and policies of the Act including the posting of a remedial notice consistent with the Board's recent modifications to its standard remedies in *Indian Hills Care Center*, 321 NLRB 144 (1996).

The Respondent argues against the traditional status quo ante remedy for the unilateral changes found herein based both on the alleged obduracy of the Union in bargaining and the Union's behavior away from the table. I have determined, infra, that the Union may not be held to have engaged in improper non-table bargaining conduct. As to the alleged obduracy, it is true that essentially no progress was made during the long negotiations to close the fundamental differences between the positions of the parties as to the shape of the new contract. But, as also found above, it was the Respondent's fundamental overreaching from the very start of negotiations in its efforts to obtain the Union's acquiescence to waiving its rights to a role in establishing and negotiating employees terms and conditions of employment through the life of the new contract that was the cause of this failure to narrow differences rather than the Union's inflexibility in bargaining. Since the Respondent's initial, continuing and "core" premise in the negotiations has been found improper and a violation of the Act herein, the Respondent may not advance its own illegal conduct or the Union's reaction thereto to challenge the traditional remedy to the violation found.

The Respondent also argues that, if a status quo ante remedy is directed, it should be total and not simply result in the recission of portions of the currently applied working conditions favorable to the Respondent while retaining those favorable to the Union. The Respondent argues on brief at 67: "There are serious questions in this connection concerning the rule in *NLRB vs. Katz*, 369 U.S. 736 (1962), and unjust enrichment." I shall leave reconsideration of the Supreme Court's fountainhead decision to higher authority.

The remedy for the Respondent's failure to notify the Union and give it an opportunity to bargain respecting the Respondent's unilateral changes from the terms and conditions of unit employees as set forth in the expired contract and maintained into December 1996 shall include restoration of the improperly changed conditions, i.e., a return to the status quo ante before the institution of the changes in December 1996 and thereafter without rolling back the increases and improvements in wages and working conditions. *NLRB v. Katz*, 369 U.S. 736 (1962); *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964). This status quo ante shall be maintained by Respondent unless and until it has notified and bargained with the Union and reached agreement or valid impasse in bargaining respecting a change in terms and conditions of employment.

As the Board directed in *Owens-Corning Fiberglass*, 282 NLRB 609, 610 (1987), and *Getty Refining Co*., 279 NLRB 924 (1986), I shall include a provision that the Respondent make unit employees whole for any and losses suffered by them as a result of the improper changes, with interest, as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987); See also *Florida Steel Corp.,* 231 NLRB 651 (1977), and *Isis Plumbing Co*., 139 NLRB 716 (1962).

CONCLUSIONS OF LAW

On the basis of the above findings of fact and on the entire record herein, I make the following conclusions of law.

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The International Brotherhood of Electrical Workers, Local Union 1002, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.
3. The Union represents the Respondent's employees in the following unit (the Unit) which is appropriate for bargaining within the meaning of Section 9 of the Act:

> All outside construction and maintenance employees who work on the Respondent's property and power generation

> employees in operations and in construction and maintenance, excluding clerical employees, supervisory employees and guards.

4. The Respondent violated Section 8(a)(1) of the Act by sending an electronic mail communication to its unit employees on October 14, 1996, soliciting employees to notify the Respondent that they no longer wished to be represented by the Union in order to enable the Respondent to obtain an election to remove the Union as the unit employees' collective-bargaining representative.

5. The Respondent violated Section 8(a)(5) and (1) of the Act, on and after July 1996, by insisting as a condition of reaching any collective-bargaining agreement, that the Union agree to language in the contract which would grant the Respondent unilateral control over many terms and conditions of employment.

6. The Respondent violated Section 8(a)(5) and (1) of the Act, on and after December 1996, by implementing portions of its final contract offer to the Union without the agreement of the Union and at a time when the parties were not at a valid impasse in bargaining.

The unfair labor practices described above are unfair labor practices affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

[Recommended Order omitted from publication.]